Supreme Court
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT EARL JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 844(i) (1994 & Supp. IV 1998), which establishes criminal penalties for any person who "damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," applies to the church-burning offense in this case.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 194 F.3d 657. The opinion of the district court (App., *infra*, 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. Section 844(i) of Title 18, United States Code (1994 & Supp. IV 1998), provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years

STATEMENT

Respondent Robert Earl Johnson pleaded guilty to maliciously destroying real property by means of fire, in violation of 18 U.S.C. 844(i) (1994 & Supp. IV 1998). He was sentenced to 115 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay restitution of $89,227. The court of appeals vacated the guilty plea on the ground that the factual basis offered in support of the plea failed to establish the interstate commerce element of the Section 844(i) offense. App., *infra*, 1a-19a.

1. In December 1996, the Hopewell United Methodist Church, located in Centerville, Texas, was destroyed by fire. App., *infra*, 2a. Respondent was subsequently indicted by a federal grand jury for starting the fire, in violation of 18 U.S.C. 844(i) (1994 & Supp. IV 1998). App., *infra*, 2a. Section 844(i) establishes criminal penalties for any person who "maliciously damages or

destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

Respondent moved to dismiss the indictment, arguing "that the burning of the church was not an act that had a substantial, or any, effect on interstate commerce." App., *infra*, 21a. The district court denied the motion to dismiss. *Id.* at 21a-22a. The court explained that

> (1) the church is a member of the Texas Annual Conference of the United Methodist Church, which requires its member churches to set aside approximately 16% of its monies as apportionments, the majority of which are forwarded to the Church's General Counsel on Finance and Administration ("GFCA") in Evanston, Illinois; (2) the GFCA disburses funds to various ministries in the U.S. and around the world, to the denomination's seminaries, to the Black College Fund, to the Africa United Methodist University which supports an institution in Zimbabwe, and to various other funds and causes across the U.S.; and (3) at the time of the fire, the Church was insured by the Church Mutual Insurance Company of Merrill, Wisconsin, which paid a claim of approximately $89,257. Taken individually or in the aggregate, these facts establish the necessary interstate commerce element.

Id. at 22a. Respondent subsequently pleaded guilty to the charged offense. *Id.* at 2a.

2. Respondent appealed his conviction. The court of appeals vacated his guilty plea, concluding that the factual basis offered in support of the plea failed to

establish the interstate commerce element of the Section 844(i) offense, and that the district court had committed plain error in accepting the plea. App., *infra*, 1a-19a.[1]

a. Writing for the panel, Judge Benavides rejected respondent's contention that the interstate commerce element of Section 844(i) requires proof of a "substantial" effect on commerce in an individual case. He explained that "[respondent's] individual act of arson need not have a substantial impact on interstate commerce, so long as arsons of property used in interstate commerce or in activities affecting interstate commerce, in the aggregate, substantially impact interstate commerce." App., *infra*, 5a-6a. Judge Benavides stated, however, that while a "substantial" effect on commerce need not be shown, the government must demonstrate "an explicit connection with or effect on interstate commerce," *id.* at 9a (quoting *United States* v. *Lopez*, 514 U.S. 549, 562 (1995)), in the individual case, and that "[a] speculative or attenuated connection * * * will not suffice to demonstrate the nexus with interstate commerce," *ibid.* (internal quotation marks omitted). Judge Benavides concluded that the factual basis presented by the government at respondent's plea hearing—which described the local church's transmission of funds to the Texas Annual Conference, the Conference's forwarding of most of those funds to the national church organization, the national body's use of those funds in missionary and educational activities,

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[1] The court of appeals concluded that, notwithstanding his unconditional guilty plea, respondent could challenge as plain error the district court's finding that there was a factual basis for his plea. See App., *infra*, 4a (citing Fed. R. Crim. P. 11(f); *United States* v. *Oberski*, 734 F.2d 1030, 1031 (5th Cir. 1984); *United States* v. *Johnson*, 546 F.2d 1225, 1226-1227 (5th Cir. 1977)).

and the out-of-state insurer's payment of over $89,000 as a result of the arson—was insufficient to establish such a connection. *Id.* at 9a-10a.

In Judge Benavides's view, the fact that the local church was a member of a state organization that submitted funds to a national church did not establish the requisite interstate nexus, at least in the absence of additional information concerning the relationship of the local church to the state and national bodies. See App., *infra*, 10a ("the record contains no information from which we can discern that Hopewell was an integral part of a national body with activities explicitly connected to or affecting interstate commerce"). Judge Benavides also found the payment of an insurance claim by an out-of-state insurer to be an insufficient connection to interstate commerce. "At most," he concluded, "the impact on interstate commerce of Hopewell's filing of a claim and its payment by an out-of-state insurer is speculative. To find otherwise would be to federalize the arson of any building, vehicle, or other personal property insured by an out-of-state company." *Id.* at 11a.

b. Judge Garwood, joined by Judge Barksdale, filed a specially concurring opinion. The concurring judges agreed with the factual analysis in Judge Benavides's opinion, and agreed that it was plain error for the district court to accept the guilty plea. App., *infra*, 12a. The concurring judges would have held, however, that aggregation analysis cannot properly be applied to Section 844(i), on the theory that "[a]rsons under section 844(i) are simply not a meaningful 'class of activities' suitable for aggregation." *Id.* at 15a. They concluded that "Section 844(i) is not a regulation of any interstate market or economic activity and the individual instances of arson which it addresses are wholly unre-

lated to each other or to any particular regulatory scheme or purpose other than the prevention of arson. Aggregation is hence improper." *Id.* at 18a.

ARGUMENT

On November 15, 1999, the Court granted the petition for a writ of certiorari in *Jones* v. *United States*, No. 99-5739. The question presented in that case is "[w]hether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, * * * Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional." 120 S. Ct. 494. In *Jones*, the Seventh Circuit found that the interstate commerce element of Section 844(i) was satisfied where the home that was damaged by fire received natural gas through an interstate gas line, was mortgaged to an out-of-state lender, and was insured by an out-of state company that paid a claim for the fire damage. See *United States* v. *Jones*, 178 F.3d 479, 480-481 (1999).

This Court's decision in *Jones* will likely affect the proper disposition of the instant case.[2] The question whether coverage of real property by an out-of-state

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[2] The petition for a writ of certiorari in *Rea* v. *United States*, No. 99-6136, currently pending before this Court, also presents a question concerning the application of Section 844(i) to the damage by fire of real property owned and operated by a church. The court of appeals in *Rea* held that the church annex involved in that case "had a sufficient connection with interstate commerce to sustain Rea's conviction" because it "was used by the congregation as a schoolhouse and for other activities," contained musical equipment and books purchased from outside the State, and received natural gas from an out-of-state source. *United States* v. *Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999).

insurer is sufficient to satisfy the interstate commerce element of Section 844(i) is directly presented in both cases. More generally, the decision in *Jones* can be expected to clarify the manner in which Section 844(i)'s commerce element can appropriately be established in individual prosecutions. The petition for a writ of certiorari should therefore be held pending this Court's decision in *Jones* and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Jones* v. *United States*, No. 99-5739, and then disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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JANUARY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-50396

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT EARL JOHNSON, DEFENDANT-APPELLANT

[Nov. 1, 1999]

Before: GARWOOD, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Robert Earl Johnson ("Johnson") appeals from his criminal conviction for arson, raising an as-applied constitutional challenge to 18 U.S.C. § 844(i). Relying on *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), he argues that his burning of a Methodist church did not substantially affect interstate commerce and that, as a consequence, there was an insufficient jurisdictional basis for his arson prosecution. Because the district court committed plain error in determining that a sufficient factual basis existed to

support Johnson's plea, we vacate his guilty plea and remand for further proceedings.

I

Johnson was indicted for the December 1996 arson of the Hopewell United Methodist Church ("Hopewell") in violation of 18 U.S.C. § 844(i). Following an unsuccessful motion to dismiss, Johnson pleaded guilty. The district court entered judgment and sentenced Johnson to a 115-month term of imprisonment, three years supervised release, and $89,227 restitution.

To support Johnson's plea, the Government offered a written Factual Basis, detailing Johnson's offense. This Factual Basis contained the following information.[1] In December 1996, an arson fire destroyed the Hopewell United Methodist Church and its contents. Johnson, who lived next door to the church, admitted that he had set the fire at the church in an effort to cover up past burglaries of Hopewell. Church Mutual Insurance Company, located in Merrill, Wisconsin, insured the church building and its contents. As a result of the fire, Church Mutual Insurance Company paid a claim of over $89,000 to Hopewell. Before the December 1996 blaze, Hopewell was a member of the Texas Annual Conference of the United Methodist Church ("Texas Annual Conference"). As a member church, Hopewell contributed approximately sixteen percent of the money that it collected from its congregation to the Texas Annual Conference. The Texas Annual Conference forwards the majority of its contributions to the United Methodist Church's General Counsel on Finance

[1] Johnson made no material objection to any of the facts averred therein.

and Administration in Evanston, Illinois. The General Counsel then distributes these funds to various ministries throughout the world, to the denomination's seminaries, to the Black College Fund, and other efforts across the United States.

II

A

As a general rule, a valid guilty plea waives all non-jurisdictional defects in the proceedings against a defendant. *See United States v. Andrade*, 83 F.3d 729, 731 (5th Cir.1996) (per curiam). A defendant, however, may preserve a claim for appellate review by entering a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). *See United States v. Bell*, 966 F.2d 914, 915 (5th Cir.1992). "Failure to designate a particular pretrial issue in the written plea agreement generally forecloses appellate review of that claim." *Id.* at 916.

To establish a violation under the arson statute, 18 U.S.C. § 844(i), the government must demonstrate that a person maliciously damaged or destroyed by means of fire a "building, vehicle, or other personal property used in interstate . . . commerce or in any activity affecting interstate . . . commerce." 18 U.S.C. § 844(i). Section 844(i)'s interstate commerce requirement "while jurisdictional in nature, is merely an element of the offense, not a prerequisite to subject matter jurisdiction." *United States v. Rea*, 169 F.3d 1111, 1113 (8th Cir.1999); cf. *United States v. Robinson*, 119 F.3d 1205, 1212 n. 4 (5th Cir.1997) (explaining that the Hobbs Act's interstate commerce element is not jurisdictional in the sense that "a failure of proof would divest the federal courts of adjudicatory power over the case").

Accordingly, we find that Johnson, in entering an unconditional plea of guilty before the district court, waived his as-applied constitutional challenge to § 844(i). As a consequence, Johnson's appeal can be maintained only if construed as a challenge to the sufficiency of the factual basis for the interstate commerce element of the arson crime to which he pleaded guilty. *See United States v. Dayton*, 604 F.2d 931, 936-38 (5th Cir. 1979) (en banc) (holding that, notwithstanding a guilty plea, a defendant may appeal a district court's finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a crime).

B

A trial court cannot enter judgment on a plea of guilty unless it is satisfied that there is a factual basis for the plea. *See* Fed.R.Crim.P. 11(f). "The purpose underlying this rule is to protect a defendant who may plead with an understanding of the nature of the charge, but 'without realizing that his conduct does not actually fall within the definition of the crime charged.'" *United States v. Oberski*, 734 F.2d 1030, 1031 (5th Cir.1984) (quoting *United States v. Johnson*, 546 F.2d 1225, 1226-27 (5th Cir.1977)). This factual basis must appear in the record and must be sufficiently specific to allow the court to determine that the defendant's conduct was "within the ambit of that defined as criminal." *Id.*

We generally regard a district court's acceptance of a guilty plea as a factual finding to be reviewed under the clearly erroneous standard. *See United States v. Rivas*, 85 F.3d 193, 194 (5th Cir. 1996). Johnson, however, does

not contest the findings of fact or other Rule 11 procedures followed by the district court. Instead, he presents a "plain, straightforward issue of law: is the undisputed factual basis sufficient as a matter of law to sustain his plea." *United States v. Ulloa*, 94 F.3d 949, 955 (5th Cir.1996). Because Johnson did not present this claim to the district court and because his appeal raises an issue of law for which "we need [not] be satisfied that findings of fact regarding the factual basis are not clearly erroneous," we review for plain error. *See id.* Under the plain error standard, an appellant must show: (1) that there was error; (2) that it was clear and obvious; and (3) that it affected the appellant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 730-36, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). Even when these criteria are satisfied, we exercise our discretion to correct only those errors that "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732, 113 S. Ct. 1770.

C

Johnson argues that the Hopewell United Methodist Church was not a building used in any activity substantially affecting interstate commerce as required by § 844(i). In doing so, he attempts to engraft into individual § 844(i) prosecutions the *Lopez* requirement that an intrastate activity must substantially affect interstate commerce to be subject to congressional regulation under the Commerce Clause. *See Lopez*, 514 U.S. 549, 559, 115 S. Ct. 1624, 131 L.Ed.2d 626.

Johnson misconstrues the proper standard to be applied in assessing the sufficiency of the interstate commerce nexus. Johnson's individual act of arson need

not have a substantial impact on interstate commerce, so long as arsons of property used in interstate commerce or in activities affecting interstate commerce, in the aggregate, substantially impact interstate commerce. *See Lopez*, 514 U.S. at 561, 115 S. Ct. 1624 ("[O]ur cases uphold [ ] regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect [ ] interstate commerce."); *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27, 88 S. Ct. 2017, 20 L.Ed.2d 1020 (1968), *overruled on unrelated grounds by, National League of Cities v. Usery*, 426 U.S. 833, 854, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976), *overruled by, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985) ("[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."). In *United States v. Robinson*, we considered the constitutionality of the Hobbs Act, 18 U.S.C. § 1951(a), in the wake of the Supreme Court's *Lopez* decision. We found that the Hobbs Act's enactment was a permissible exercise of the congressional power to regulate commerce among the states. *See* 119 F.3d at 1208. In reaching this conclusion, we explicitly stated that, "We think *Lopez* makes clear that legislation concerning an intrastate activity will be upheld if Congress could rationally have concluded that the activity, in isolation or in the aggregate, substantially affects interstate commerce." *Id.* at 1211-12. Because the substantiality requirement "applies to the class of cases prosecuted in the aggregate[,] in any particular case, proof of a slight effect on interstate commerce suffices." *Id.* at 1212.

Since *Robinson*, we have not specifically addressed the question of whether proof of a slight effect on interstate commerce suffices in the context of § 844(i) prosecutions.[2] Though in agreement with Judge Garwood's point, in his special concurrence, that *Robinson* is not binding on this court, the aggregation principle is generally applicable, and the Hobbs Act and § 844(i) are strikingly similar;[3] therefore, the reasoning underlying our holding in *Robinson* applies with equal force to the instant action.

Judge Garwood disagrees with the conclusion that aggregation is here available; in his view, aggregation cannot apply because § 844(i) neither regulates an interstate market or economic activity nor are the individual instances of arson related to each other or any specific regulatory scheme. Aggregation is not so narrowly constrained. Just as the greater power includes the

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[2] The pre-*Robinson* case of *United States v. Corona*, 108 F.3d 565 (5th Cir. 1997), noted that "[t]he consequences of arson are typically local, and we have traditionally left it to the states to determine the appropriate penalty." *Id.* at 570. Although it suggested that *Lopez* might call into question earlier cases interpreting § 844(i), *Corona* did not resolve the question of whether a slight effect on interstate commerce—substantial only in the aggregate—suffices for purposes of the interstate commerce requirement. *See id.*

However, we also observe that Judge Higginbotham's dissent on behalf of half of the equally divided en banc court in *United States v. Hickman*, 179 F.3d 230, 242 (5th Cir. 1999) argues in dicta that the government could use aggregation-albeit under the dissent's more narrow theory of aggregation-to satisfy the jurisdictional element of a nexus with interstate commerce in typical prosecutions under § 844(i).

[3] Section 844(i), like the Hobbs Act, contains an explicit interstate commerce requirement.

lesser, see *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 511, 116 S. Ct. 1495, 134 L.Ed.2d 711 (1996) ("[W]e do not dispute the proposition that greater powers include lesser ones[.]"); *Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 345, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling [.]"), the lesser power here necessarily implies the greater. Judge Garwood concedes that Congress has the power to regulate arsons in a particular economic market, for instance, arsons of abortion clinics; that power can derive only from Congress' more extensive constitutional grant of the power to regulate interstate commerce generally.

"Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Quill Corp. v. North Dakota*, 504 U.S. 298, 318, 112 S. Ct. 1904, 119 L.Ed.2d 91 (1992) (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637, 101 S. Ct. 2946, 69 L.Ed.2d 884 (1981) (White, J., concurring)); *see also United States v. Green*, 350 U.S. 415, 420, 76 S. Ct. 522, 100 L.Ed. 494 (1956) (upholding the Hobbs Act because "the legislation is directed at the protection of interstate commerce against injury [.]"); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434, 66 S. Ct. 1142, 90 L.Ed. 1342 (1946) ("[The Commerce Clause's] scope enables Congress not only to promote but also to prohibit interstate commerce[.]"). Thus the power of Congress to protect or promote individual markets derives from its power likewise to foster and encourage interstate commerce generally. Section 844(i) is a reflection of Congress' clear intent to protect and promote interstate commerce in general.

This does not mean, however, that aggregation obliterates, or even circumscribes materially, our federal system. In order to aggregate, the government must show that the arson has "an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624. A "speculative" or "attenuated" connection, however, will not suffice to demonstrate the nexus with interstate commerce. *United States v. Collins*, 40 F.3d 95, 99, 101 (5th Cir.1994); *see also United States v. Corona*, 108 F.3d 565, 570 (5th Cir.1997) (rejecting "speculative" effects on interstate commerce as insufficient).

Here, the Government identifies four facts that it contends support a determination that the Hopewell Church was a building used in or affecting interstate commerce or used in any activity affecting interstate commerce: (1) Hopewell's membership in the Texas Annual Conference, to which Hopewell annually contributed funds raised from its members and other sources; (2) the Conference's forwarding of the majority of those funds to the United Methodist Church's national office in Illinois; (3) the national organization's distribution of those funds to various missionary activities, seminaries, and institutions of higher education; and (4) an out-of-state insurer's payment of a claim for more than $89,000 to Hopewell.[4] We find that these facts do not provide a sufficiently specific factual basis from which the district

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[4] In its appellate brief, the Government references several additional facts tending to show an interstate commerce nexus. That information, however, was not part of the factual basis presented by the Government to the district court at the time of Johnson's plea and therefore could not properly be relied upon by the district court in determining whether or not to accept Johnson's guilty plea.

court could have determined that Johnson's arson was within the scope of 18 U.S.C. § 844(i). By accepting Johnson's plea without an adequate factual basis, the district court committed plain error.

The Government failed to present to the district court any information clarifying the nature of the relationship between Hopewell and the Texas Annual Conference or between Hopewell and the national United Methodist Church. In particular, the record contains no information from which we can discern that Hopewell was an integral part of a national body with activities explicitly connected to or affecting interstate commerce. Merely being a dues-paying member of an organization that funds a national body does not satisfy § 844(i)'s interstate commerce element. Thus, Hopewell's membership in the Texas Annual Conference does not establish an explicit connection or effect on interstate commerce.

The out-of-state insurer's payment of the $89,000 claim also does not establish the interstate commerce element. Critical to our determination in *Robinson* that "robberies affecting interstate commerce are precisely the sort of acts 'that might, through repetition elsewhere, substantially affect . . . interstate commerce'" was our recognition that the charged robberies in that case had an explicit connection with and effect upon interstate commerce. *Robinson*, 119 F.3d at 1208 (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624). We explained that the stores targeted by Robinson and his gang were robbed of thousands of dollars and "that the robberies impaired [the stores'] ability to cash out-of-state checks and to restock goods shipped from other states." *Id.* at 1215. Unlike the concrete effects of the

robberies in *Robinson*, an out-of-state company's payment of an insurance claim does not amount to an explicit connection or effect on interstate commerce to which the aggregation principle would apply. At most, the impact on interstate commerce of Hopewell's filing of a claim and its payment by an out-of-state insurer is speculative. To find otherwise would be to federalize the arson of any building, vehicle, or other personal property insured by an out-of-state company. Accordingly, we hold that the factual basis presented to the district court does not support a finding that Johnson's December 1996 arson of the Hopewell United Methodist Church resulted in the damage or destruction of a building used in interstate commerce or in any activity affecting interstate commerce.

III

For the aforementioned reasons, we conclude that the district court committed plain error in accepting Johnson's plea of guilty. Because the factual basis presented to the district court fails to establish the interstate commerce element of 18 U.S.C. § 844(i), we exercise our discretion under *Olano*, 507 U.S. at 732, 113 S. Ct. 1770, to vacate Johnson's guilty plea and remand for further proceedings consistent with this opinion.

Garwood Circuit Judge, with whom RHESA HAWKINS BARKSDALE, Circuit Judge, joins, specially concurring:

Application of 18 U.S.C. § 844(i) continues to trouble this Court. *See, e.g., United States v. Corona*, 108 F.3d 565, 568-71 (5th Cir.1997); *United States v. Nguyen*, 117 F.3d 796, 798 and dissenting opinion at 798-800 (5th

Cir.), *cert. denied* 522 U.S. 987, 118 S. Ct. 455, 139 L.Ed.2d 389 (1997).

While I concur in the result here, and agree with Judge Benavides' factual analysis reflecting that it was plain error for the district court to conclude that the factual basis for the plea reflected a constitutionally adequate relation to interstate commerce, I disagree with the aggregation analysis in Judge Benavides' opinion.

In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court set out "three broad categories of activity that Congress may regulate under its commerce power," as follows:

> "First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . [Third] Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, 57 S. Ct. at 624, i.e., those activities that substantially affect interstate commerce. *Wirtz*, *supra* at 196, n. 27, 88 S. Ct. at 2024, n. 27." *Lopez*, 115 S. Ct. at 1629-30.

It is evident that we are here dealing with the third *Lopez* category, the only category as to which the

"substantially affect interstate commerce" requirement and the concept of aggregation are relevant.[1]

I agree with the position taken by Judge Higginbotham, joined in by seven other judges of this Court, in *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc; evenly divided court), stating that for purposes of *Lopez*'s third category:

> ". . . substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections among them. Of course, Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme." *Id.* at 231.

In *Lopez* this Court refused to countenance the government's attempt to salvage the Gun Free School

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[1] Appellant was convicted of violating 18 U.S.C. § 844(i) which proscribes arson of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." It is evident that the church building that appellant burned was not "used in interstate or foreign commerce," and on appeal the Government merely argues that "Defendant's arson of the Hopewell United Methodist Church was a crime under Section 844(i) because the Church building was used in an activity affecting interstate commerce" and that the burned church was "a building used in an activity affecting commerce." Judge Benavides' opinion does not suggest that either the first or second *Lopez* categories are involved or that the church building was "used in interstate or foreign commerce."

Zones Act (18 U.S.C. § 922(q)) by an aggregation argument, viz:

> "The government seeks to rely on the rule that '[w]here the *class of activities* is regulated and that *class* is within the reach of the federal power, the courts have no power "to excise as trivial, individual instances" of the class.' This theory has generally been applied to the regulation of a class of activities the individual instances of which have an interactive effect, usually because of market or competitive forces, on each other and on interstate commerce. A given local transaction in credit, or use of wheat, because of national market forces, has an effect on the cost of credit or price of wheat nationwide. Some such limiting principles must apply to the 'class of activities' rule, else the reach of the Commerce Clause would be unlimited, for virtually all legislation is 'class based' in some sense of the term." *United States v. Lopez*, 2 F.3d 1342, 1367 (5th Cir.1993) (quoting *Perez v. United States*, 402 U.S. 146, 153-54, 91 S. Ct. 1357, 1361, 28 L.Ed.2d 686 (1971); *Wirtz*, 392 U.S. at 192-94, 88 S. Ct. at 2022).

The Supreme Court in *Lopez* likewise rejected the government's aggregation argument, stating, in language fully applicable to section 844(i), as follows:

> "Section 922(q) is not an essential part of a larger regulation of economic activity, in which the *regulatory scheme* could be undercut unless the intrastate activity were regulated. It cannot, *therefore*, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggre-

gate, substantially affects interstate commerce." *Id.*, 115 S. Ct. at 1631 (emphasis added).

In *United States v. Bird*, 124 F.3d 667 (5th Cir.1997), this Court quoted with approval the above set out passage from our *Lopez* opinion (124 F.3d at 676-77) and went on to say:

> "Unless there is something that relevantly ties the separate incidents and their effects on interstate commerce together, aside from the desire to justify congressional regulation, the government's 'class of activities' interpretation would transform Justice Breyer's *Lopez* dissent into the constitutional rule." *Bird* at 677.

Arsons under section 844(i) are simply not a meaningful "class of activities" suitable for aggregation. Section 844(i) is not limited to arsons affecting any particular class of business or any particular national market but extends, without differentiation, to all arsons of personal as well as business property, so long as the property is "used . . . in any activity affecting interstate commerce," which would include, for example, the cowboy's boots. To allow such aggregation would necessarily mean that section 844(i) is not any kind of a regulatory scheme of any interstate or national market. The act's focus would be on the crime, arson—not on any effect on interstate commerce. Indeed, although section 844(i) requires that the fire be one which "damages" "property used . . . in any activity affecting interstate or foreign commerce," its terms contain no requirement that the fire or the damage to the property have any effect on interstate commerce (or on the activity affecting interstate commerce in which the property is used). Moreover, there

is no requirement in section 844(i) that the "activity" be a commercial or economic one.[2]

Application of the aggregation principle to this case, which involves no effort to regulate any interstate market nor any related regulatory scheme, in effect gives Congress the Commerce Clause power to regulate all arsons, a result not supported by the language of the Constitution or the intent of its framers. Judge Benavides' approach of essentially unlimited aggregation would allow Congress—wholly apart from any scheme of regulation of any "commerce among the several states,"—to enact a preemptive national criminal and civil code applicable to *all* conduct and activity of a purely local nature. This is so because every individual action no matter how local will ultimately have some at least minute interstate affect,[3] and it will always and inevitably be the case that the aggregation of *all* such conduct would substantially affect interstate commerce. *If* Congress has that power then it doubtless also has the "lesser" power to regulate all arsons; but to conclude that Congress has such power is necessarily to conclude that the commerce

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[2] *Cf. Lopez*, 115 S. Ct. at 1633: "We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process" (emphasis added). Surely the nation's churches are no more within the reach of the Commerce Clause than its educational processes.

[3] *See, e.g., Lopez*, 115 S. Ct. at 1633, quoting approvingly from Justice Cardozo's concurring opinion in *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 55 S. Ct. 837, 853, 79 L.Ed. 1570 (1935), "'A society such as our "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size"'."

power is essentially unlimited, contrary to *Lopez* as well as to the Constitution's basic federal scheme reaffirmed in the Tenth Amendment.

Judge Benavides would slightly soften this blow by holding that instances of local activity may not be aggregated for purposes of the substantial affect requirement of *Lopez*'s third category unless their *individual* affect on interstate commerce is more than "speculative" or "attenuated," notwithstanding that *if* aggregated their total interstate affect would be substantial. No explanation is given of why aggregation is improper in such instances—notwithstanding a substantial affect if aggregated—but nevertheless is proper in instances involving unrelated local non-commercial activities immaterial to any interstate regulatory scheme whose aggregated interstate affect may even be less than the aggregated interstate affect of the instances Judge Benavides would refuse to aggregate. And, if Judge Benavides' approach is more than purely cosmetic and rhetorical, it is in substantial tension with *Lopez*'s recognition of the propriety of aggregation where the challenged rule forms "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* 115 S. Ct. at 1631. In such a situation, individual activities each of which may be "trivial by itself" or "de minimis," may be aggregated. *See Lopez* at 1628, 1629.[4] It is difficult to

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[4] *Lopez*, 115 S. Ct. at 1628 notes that in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942) "Filburn's own contribution to the demand for wheat may have been trivial by itself," and, at 1631, quotes approvingly from the statement in *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968), referring to the decision there and in

see a meaningful difference between affects which are "trivial" or "*de minimis*" and those which are "speculative" or "attentuated;" and Judge Benavides' opinion affords no assistance in this respect. Finally, Judge Benavides' open-ended aggregation theory, bounded by no principled limits, in substance does away with the substantially affect requirement of *Lopez*'s third category—for if essentially anything and everything can be aggregated then substantiality will always be satisfied. And, it likewise renders wholly meaningless *Lopez*'s special treatment of enactments which form "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activities were regulated" as to which the thus regulated intrastate activities are to be "viewed in the aggregate" for purposes of satisfying the third category's substantiality requirement. *Id.* at 1631.

Section 844(i) is not a regulation of any interstate market or economic activity and the individual instances of arson which it addresses are wholly unrelated to each other or to any particular regulatory scheme or purpose other than the prevention of arson. Aggregation is hence improper.[5]

Wickard, that "[t]he Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence" (emphasis supplied by *Lopez*).

[5] And, as we observed in *Bird*, 124 F.3d at 682, n. 15:

"Certainly when Congress is regulating *inter* state commercial activity, its reason for doing so is immaterial. But where, as here, Congress is regulating purely *intra* state, noncommercial activity because of its *substantial affect* on interstate commerce, the purpose must in fact be to regulate interstate

I recognize that language in this Court's opinion in *United States v. Robinson*, 119 F.3d 1205 (1997), supports the position taken by Judge Benavides here. I disagree with that aspect of *Robinson*, and I would not extend *Robinson*, a Hobbs Act case, to the instant section 844(i) prosecution.[6]

Accordingly, although I concur in the result I am unable to entirely join Judge Benavides' opinion.

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commerce. '*Let the end* be legitimate, let it *be within the scope of the constitution*, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the *letter and spirit* of the constitution, are constitutional.' *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819) (emphasis added). *See also id.* at 423 ('should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government,' Supreme Court would be bound to hold law invalid)."

[6] I observe that the terms of the Hobbs Act, 18 U.S.C. § 1951, at least require that the there proscribed *robbery* be one which "affects [interstate] commerce," while, as I have noted, section 844(i) has no such requirement respecting its proscribed *arson* of property used in any activity affecting interstate commerce.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CRIMINAL NO. W-97-CR-083

UNITED STATES OF AMERICA

v.

ROBERT EARL JOHNSON

[Nov. 10, 1997]

ORDER

The Defendant is charged in a one-count indictment with the crime of arson, a violation of 18 U.S.C. § 844(l). Specifically, the Defendant is charged with burning down the Hopewell United Methodist Church in Centerville, Texas.

The Defendant has filed a number of pre-trial motions. In response to Defendants' various discovery motions, the Government states that it will provide discovery in compliance with the Federal Rules of Criminal Procedure, the Jencks Act, and the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963). At the pre-

trial motions hearing, Defendant did not present any argument that discovery should be expanded beyond these limitations, or indicate that there were any problems with discovery that required intervention by the Court. Accordingly, it is **ORDERED** that the following discovery-related motions will be **DENIED** as moot for the reasons stated above:

1. Motion for Notice of Government's Intention to Use Evidence

2. Motion for Disclosure of Electronic or Other Surveillance

3. Motion to Discover Transcripts of Grand Jury Testimony and for Extension of Time to File Motion to Quash Indictment

4. Motion for Disclosure of Agreements Between the Government and Government Witnesses

5. Motion for Discovery and Inspection

The Defendant additionally moves to dismiss the indictment, citing the recent Supreme Court opinion in *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624 (1995). Defendant argues that § 844(I) is beyond the commerce powers of Congress, and that the burning of the church was not an act that had a substantial, or any, effect on interstate commerce. As the Government notes, the Supreme Court prior to *Lopez* upheld the constitutionality of the arson statute in *Russell v. United States*, 471 U.S. 858 (1985). This case is controlling, "at least until the Supreme Court reconsiders it in light of [*Lopez*]." *United States v. Nguyen*, 117

F.3d 796, 798 (5th Cir. 1997) (petition for writ of certiorari filed Oct. 2, 1997). Further, the facts in the Government's brief, which are uncontroverted by the Defendant, reflect that the Hopewell Methodist Church constituted a building used in or affecting commerce to the extent that dismissal of the indictment would be inappropriate. As the Government notes: (1) the church is a member of the Texas Annual Conference of the United Methodist Church, which requires its member churches to set aside approximately 16% of its monies as apportionments, the majority of which are forwarded to the Church's General Counsel on Finance and Administration ("GFCA") in Evanston, Illinois; (2) the GFCA disburses funds to various ministries in the U.S. and around the world, to the denomination's seminaries, to the Black College Fund, to the Africa United Methodist University which supports an institution in Zimbabwe, and to various other funds and causes across the U.S.; and (3) at the time of the fire, the Church was insured by Church Mutual Insurance Company of Merrill, Wisconsin, which paid a claim of approximately $89,257. Taken individually or in the aggregate, these facts establish the necessary interstate commerce element. Accordingly, the Defendant's Motion to Dismiss the Indictment is **DENIED.**

In his final motion, the Defendant seeks to suppress various written and oral statements made by him on the grounds that such statements were taken in violation of his Constitutional rights. Having listened to the testimony of the witnesses at the pre-trial hearing, the Court gives credence to the testimony of Jim Huggins ("Huggins") of the Texas Rangers and Jim Rose ("Rose") of the Bureau of Alcohol, Tobacco and Firearms who testified that on each occasion the De-

fendant was questioned, he was advised of his Constitutional rights, understood those rights, voluntarily and intelligently agreed to waive those rights, and never requested the presence or assistance of an attorney during any questioning. Further, there was no evidence that the Defendant had either been appointed or retained an attorney either in state court or federal court until April 10, 1997, when he was arraigned in state court. Additionally, the Defendant was never threatened by Rose or Huggins, nor did the agents make any promises to Defendant in return for his statements. Specifically as to the confession given to Huggins on April 10, 1997, the Court determines from the testimony of both Huggins and the Defendant, that the Defendant initiated the conversations leading to his confession. It was the Defendant's desire at that time to "clear his conscience" and "set the record straight."

There was nothing presented to the Court to indicate that the Defendant suffered from any mental disease or defect that would make him incapable of understanding and/or knowingly and intelligently waiving his rights. The Defendant was able to read aloud in Court the *Miranda* rights portion of the written statements he initialed and signed. He also testified that he was a high school graduate and appeared of average intelligence. The Defendant is additionally familiar with the criminal justice system, having been arrested on at least 18 prior occasions and having been incarcerated three previous times. Accordingly, the Court is persuaded that the statements made by Defendant were made freely, intelligently and voluntarily after having been advised of his constitutional rights, and that his waiver of those rights was also made freely, intelli-

gently and voluntarily, including his right to counsel. Therefore, Defendant's Motion to Suppress is **DENIED.**

SIGNED this 10 day of November, 1997.

/s/ WALTER S. SMITH, JR.
WALTER S. SMITH, JR.
United States District Judge